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No. 82-402

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT L. DURNING, JR., Trustee of Estate of R. L. Durning, deceased - - Appellant

versus

CITY OF LOUISVILLE, et al. - - - Appellees

Appeal from Court of Appeals of Kentucky

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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May it Please the Court:

Appellees, in their joint motion to dismiss/affirm, do not—and cannot—deny Durning's Statement of the Facts. Appellees do offer several arguments which require a brief reply:

First: There are *no* factual issues surrounding Durning's claim of a denial of procedural due process. All pertinent facts stood admitted and uncontrovertible in the tral court, and remain so in this Court.[1] Appellees successfully urged the Kentucky courts to *ignore* these uncontroverted facts, by contending that rezoning is constitutional and, therefore, the *procedures* em-

[1]Jurisdictional Statement, p. 7, n. 1.

ployed to rezone in this case cannot violate the due process clause. The only issues involved on this appeal are issues of *law* and not of *fact*.[2]

Second: This Court's decisions in the field of zoning have dealt almost exclusively with the *substantive* due process requirements for *city-wide* ordinances. The question of *procedural* due process in the enactment of a downzoning ordinance directed at only *one citizen* is unsettled and substantial.[3]

Third: Appellees urge that Durning failed to raise his constitutional claims before the Commission and the Board. However, appellees do not suggest how Durning could possibly have anticipated the irregular procedural steps which began in March of 1975, *after* Durning had presented his evidence at the hearing in January of 1975. Moreover, the mayor's consideration of materials added to the record after the hearing, the mayor's private correspondence with downzoning advocates and his membership in their private organization, as well as the memberships of the two aldermen, and the aldermanic custom to follow the recommendation of the aldermen of the ward where the land lies, did not come to light until discovery proceedings were authorized by the trial court on March 22, 1976, five months after the downzoning ordinance took effect. Appellees' contention that there were insufficient federal cases cited to the Kentucky courts is without merit, moreover the proper framing and presentation

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[2]5A Moore's Federal Practice (2nd Ed. 1982 rev.), ¶ 52.05[1].

[3]Jurisdictional Statement, p. 17, n. 43.

of federal questions does not require citations of federal case law.[4]

Fourth: Appellees' final contention is that 28 U. S. C. § 1257(2) has no application because Durning is not attacking a zoning ordinance of general, city-wide application. It is true that he is attacking an ordinance which relates only to his property. It is precisely *because* the ordinance is not one which affects all property in the City, but is a rezoning of a single tract, that Durning was entitled to a due process adjudicatory hearing.[5] The Kentucky courts upheld this ordinance despite its repugnance to the United States Constitution. Appellees further argue that this litigation likely will affect no one but Durning when actually this case provides opportunity for this Court to settle the conflict among the highest courts of various states as to whether rezoning proceedings are quasi-judicial.[6]

Three items of appellees' brief warrant final comment. (1) They refer to the decision of the Court of Appeals as unanimous. The decision was 2-1, with a strong dissent.[7] (2) Their appendix exhibits fail to show a 26 acre R-7 apartment complex on the same street as the Durning tract.[8] Moreover, within the areas shown, the Durning tract is the only one to be downzoned, proof of the denial of equal protection.

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[4]See *Street* v. *New York*, 394 U. S. 576, 584 (1969).

[5]Jurisdictional Statement, p. 18.

[6]*Id.*, p. 18, n. 45, 46.

[7]*Id.*, pp. 25-27.

[8]Doc. 1 (plat), R. 103, 137, 250-251.

(3) This is not an appeal under KRS 100.347, but is an independent action attacking the validity of a city ordinance.[9]

CONCLUSION

For the foregoing reasons, and based upon the authorities cited, this Court should take jurisdiction of this appeal, or, in the alternative issue a writ of certiorari to the Kentucky Court of Appeals to review its judgment. In either event, this Court should invalidate Ordinance No. 128, Series 1975, of the City of Louisville and reverse the decision of the Kentucky Court of Appeals rendered on October 2, 1981.

Respectfully submitted,

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[9]See *City of Louisville* v. *McDonald*, Ky., 470 S. W. 2d 173, 179 (1971).